

Honorable Ronald B. Leighton

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON – TACOMA**

LEONARD PELTIER, CHAUNCEY
PELTIER,

Plaintiffs,

vs.

JOEL SACKS, individually and in his capacity
as DIRECTOR OF the WASHINGTON
STATE DEPARTMENT OF LABOR AND
INDUSTRIES; TIMOTHY CHURCH,
individually and in his capacity as PUBLIC
AFFAIRS MANAGER of the WASHINGTON
STATE DEPARTMENT OF LABOR AND
INDUSTRIES; JAY INSLEE, individually and
in his capacity as GOVERNOR OF THE
STATE OF WASHINGTON; EDWARD P.
WOODS; LARRY LANGBERG; DOES 1-
200,

Defendants.

Case No. 3:17-cv-05209-RBL

**LARRY LANGBERG’S MOTION FOR
ATTORNEY FEES AS ORDERED DKT.
NO. 25 Filed 07/25/17**

NOTE ON MOTION CALENDAR:
August 11, 2017

I. INTRODUCTION AND RELIEF REQUESTED

Attorney fees are recoverable by a contract provision or if a statute allows for recovery. In this matter, there were a total of six causes of action asserted within Plaintiffs’ Complaint against Defendants, with three claims against Larry Langberg relating to counts four, five and six: 1) defamation; 2) intentional infliction of emotional distress; and 3) negligence.

In this case, RCW 4.24.510 provides Mr. Langberg immunity from civil liability for Plaintiffs' claims against him where the following elements were met: (1) defendants provide a communication to a government agency; (2) a civil complaint is filed against the defendants based upon the communication provided by the defendants; and (3) the communication is on an issue of concern to the government agency. Here, all elements were satisfied and Plaintiffs' claims against Mr. Langberg were dismissed on July 25, 2017. (DKT. #25, Order Granting Motion to Dismiss.) Mr. Langberg now petitions the Court for an award of his reasonable fees incurred in this matter.

II. STATEMENT OF FACTS

Plaintiffs Peltier filed their Complaint on March 21, 2017, alleging constitutional violations, defamation, and negligence claims against Defendants. This SLAPP lawsuit was filed against Mr. Langberg in his personal capacity, requiring he retain counsel to defend the suit. (*See* Kyle D. Riley Declaration (hereinafter "Decl. Riley") at ¶ 2.)

The law office of Smith Freed Eberhard, P.C. was retained in this matter in May 2017 to defend Larry Langberg. *Id.* Since that time, the total amount of attorney and paralegal fees accumulated was \$13,711.50. (*See* Client Detailed Time and Expense Report, attached at **Exhibit A** to Decl. Riley.) A variety of people in the firm worked on this case. Kyle D. Riley was the primary partner and Jeremy H. Rogers as Senior Counsel assisted handling this matter. Other employees have worked on this case relative to delegated, specific tasks. Mr. Langberg's counsel has reduced the requested fees for this work from \$13,711.50 to \$12,726.00 in an effort to apportion fees directly related to the litigation. In addition, Mr. Langberg's counsel conservatively expects to generate an additional \$750 for the purposes of this fee petition. Thus, Mr. Langberg requests \$13,476 in fees and costs.

JDE is the abbreviation for Jeffrey D. Eberhard, Partner; KDR is the abbreviation for Kyle

1 D. Riley, Partner; JHR is the abbreviation for Jeremy H. Rogers, senior counsel; MHS, is the
2 abbreviation for Michelle H. Sullivan, Paralegal. The hourly rate for a Partner or Senior Counsel
3 is \$180.00; the hourly rate for an Associate \$160.00; the hourly rate for a Paralegal is \$95.00. Mr.
4 Eberhard provided a total of 1.20 hours, for a fee of \$216.00. Mr. Riley provided a total of 21.9
5 hours, for a fee of \$3,942.00. However, the requested fee for Mr. Riley has been reduced from
6 \$3,942.00 to \$3,456.00. Mr. Rogers provided a total of 52.60 hours, for a fee of \$9,468.00, but
7 the requested fee has been reduced from \$9,468.00 to \$9,054. Ms. Sullivan provided a total of 0.9
8 hours for a fee of \$85.50. Reimbursement for her time is not being sought.

9
10 No expert costs or other associated fees incurred in the defense of this matter are being
11 requested within the award sought herein.

12 Plaintiffs' counsel was on notice that Mr. Langberg intended to assert SLAPP immunity
13 prior to filing his motion to dismiss. On May 16, 2017, Mr. Riley and Ms. Mell contacted Mr.
14 Hildes and spoke to him specifically about the merits of the immunity defense. Decl. Riley ¶3.
15 Mr. Hildes' only comment at the time was that he thought the statute was unconstitutional. *Id.*
16 Ms. Mell informed Mr. Hildes that this statute was not unconstitutional as the *Davis* case did not
17 apply to this statute. *Id.* Notably, Plaintiffs did not raise constitutionality as an issue when they
18 opposed Defendants Motion. Plaintiffs Peltier had adequate opportunity to amend or withdraw
19 their Complaint as to Mr. Langberg, yet they elected to continue with the unrecoverable claims —
20 despite knowledge of the precise, applicable immunity – and despite having the opportunity to
21 withdraw the claims even after being faced with Defendants' motion. Plaintiffs provided no good
22 faith basis for claiming the lawsuit was not a SLAPP suit protected by RCW 4.24.510. Mr.
23 Langberg moved for SLAPP protection in conjunction with Mr. Woods, and the Order was granted
24 to dismiss the claims against both individuals in accordance with the statute.
25
26

Please note that this motion is noted as requested by the court in the order entered on July 25, 2017. *See* Dkt. No. 25. Plaintiffs' counsel Mr. Hildes submitted a very broad notice of unavailability on July 5, 2017 from July 4, 2017 through July 11, 2017 and from July 23, 2017 through August 29, 2017 for a variety of reasons. *See* Dkt. No. 23 and No. 24. Defendant Langberg has noted this motion to be heard on August 11, 2017 as he does not want to waive his fee request and wishes to comply with the court's order. Should the Court wish to re-note the hearing for some time after Mr. Hildes' Notice of Unavailability, Defendant Langberg has no objection.

III. LEGAL AUTHORITY

A strategic lawsuit against public participation, a SLAPP suit, is a meritless suit filed primarily to chill a defendant's exercise of First Amendment rights. *City of Seattle v. Egan*, 179 Wn.App. 333, 337, 317 P.3d 568 (2014). In a recent unpublished decision by the Court of Appeals of Washington, Division 2, the Court acknowledged on appeal that despite "RCW 4.24.510 provid[ing] no procedural mechanism to defend a SLAPP suit, a party may still be immune from civil liability and recover statutory damages, reasonable expenses, and attorney fees under RCW 4.24.510." *Verdier v. Bost*, 192 Wash. App. 1066, review denied, 186 Wash. 2d 1011, 380 P.3d 487 (2016) at *2 WL 917827 citing, e.g., *Segaline v. Dep't of Labor & Indus.*, 169 Wn.2d 467, 238 P.3d 1107 (2010); *Harris v. City of Seattle*, 302 F.Supp.2d 1200 (W.D.Wash.2004).

A. Mr. Langberg Incurred Reasonable Attorney Fees in Defending this Lawsuit.

RCW 4.24.510 states that attorneys' fees and costs shall be awarded to a person prevailing upon the defense for a communication of a complaint or information to a state organization and for which that party is immune from civil liability for such communication. "A person prevailing

1 under RCW 4.24.510 is entitled to recover expenses reasonable attorney fees.” *Bailey v. State*,
 2 147 Wash. App. 251, 263, 191 P.3d 1285, 1291 (2008).

3 Plaintiffs claimed that the Defendants in this matter, namely Mr. Langberg and Mr. Woods,
 4 had defamed Leonard Peltier by communicating their legitimate public concern over the artwork
 5 that was displayed to the governor and other self-regulatory agencies for the artwork that was being
 6 displayed.

7 A substantial amount of litigation between the parties involved the ultimate dismissal of
 8 the lawsuit against Mr. Langberg, with prejudice, due to his immunity for the complained of
 9 communications. The motion to dismiss was granted and an order entered providing for an award
 10 of costs and fees for the prevailing parties, pursuant to RCW 4.24.510.

11 **B. The Attorneys’ Fees Requested Are Reasonable.**

12 The lodestar method is used in Washington to determine an award of reasonable fees and
 13 costs. *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 149-50, 859 P.2d 1210 (1993). First, the Court
 14 must determine counsel’s amount of reasonable number of hours in securing a successful result
 15 for the client, excluding any wasteful or duplicative hours and any hours pertaining to unsuccessful
 16 theories or claims. *Id.* at 151. It is petitioning counsel’s responsibility to provide contemporaneous
 17 records documenting the hours worked, the type of work performed, and the category of the
 18 attorney who performed the work. *Id.*; *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581,
 19 597, 675 P2d 193 (1983). Second, the Court must determine the reasonableness of the hourly rate
 20 of counsel at the time counsel actually billed the client for services. *Fisher Properties, Inc. v.*
 21 *Arden-Mayfair, Inc.*, 115 Wn.2d 364, 376-77, 798 P.2d 799 (1990). Finally, the Court should
 22 calculate the lodestar fee by multiplying the reasonable hourly rate by the reasonable number of
 23 hours incurred in obtaining the successful result. *Fetzer*, 122 Wn.2d at 150.

1 A description of the work performed by Smith Freed Eberhard, P.C., including who
 2 performed the work, the type of work performed, and the hours spent on the task is attached to the
 3 Declaration of the Kyle Riley. The billing rate of the attorneys is reasonably based on their
 4 expertise and experience, and is well below market for the usual and customary rate for this type
 5 of work in Washington State. The amount of time spent by the relative timekeepers was
 6 appropriate and efficient.

7 IV. CONCLUSION

8 Under RCW 4.24.510, Mr. Langberg is immune from civil liability for Plaintiffs' claims
 9 against him because all of the applicable elements providing immunity were met. Attorney fees
 10 incurred in this matter were reasonable and necessary to protect the rights of Mr. Langberg, and
 11 counsel for Mr. Langberg respectfully requests this petition to award his reasonable attorney fees
 12 be granted. A proposed form of order is enclosed with this submission for the Court's review.
 13

14 DATED this 3rd day of August 2017.
 15

16 **SMITH FREED EBERHARD, P.C.**

17 /s/ Kyle D. Riley

18 Jeremy H. Rogers, WSBA No. 36292

19 E-mail: jrogers@smithfreed.com

20 Kyle D. Riley, WSBA No. 38078

21 E-mail: kriley@smithfreed.com

22 705 Second Avenue, Suite 1700

23 Seattle, Washington 98104

24 *Counsel for Larry Langberg & The Society of*
 25 *Former Special Agents of the FBI*
 26

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above **LARRY LANGBERG'S PETITION FOR ATTORNEY FEES, DECLARATION OF KYLE RILEY, and PROPOSED ORDER** have been filed with the United States District Court via the CM/ECF system which gives automatic notification to the following attorneys of record:

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Counsel for Joel Sacks, Timothy Church, & Gov. Jay Inslee

DATED this 3rd day of August 2017.

/s/ Kyle D. Riley
Kyle D. Riley, WSBA No. 38078